this cause, permitting the Commission to agree with the Company to be regulated thereby upon a schedule of rates and to make and promulgate an effective Order prescribing such stipulated schedule, without notice, hearing, evidence or findings of fact based upon evidence taken and recorded, renders said statute unconstitutional in conflict with Section I of the Fourteenth Amendment to the Federal Constitution denying subscribers and the public the substantive right to judicial review of rate orders of said Commission, secured to them by said Federal due process provisions.

STATEMENT OF JURISDICTION.

The said Supreme Court of the State of Minnesota is the highest court of the State of Minnesota in which a decision could be had in a cause of this character. The said final judgment of said Supreme Court of the State of Minnesota was entered and docketed in said court, in this cause, on the 21st day of August, 1940.

There is drawn in question, in this cause, the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States.

There is drawn in question, in this cause, the validity of a statute of the State of Minnesota, as construed by the opinion and final judgment of the said Supreme Court of the State of Minnesota in this cause, on the ground that as so construed said statute is repugnant to the Constitution of the United States.

There is drawn in question, in this cause, the validity of an order prescribing and promulgating, or purporting to prescribe and promulgate, rates and charges for tele-

phone service to subscribers of a public utility telephone company made and entered by the Railroad and Warehouse Commission of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States.

There is drawn in question, in this cause, the validity of the opinion and final judgment of the Supreme Court of the State of Minnesota, in this cause, on the ground that the same are repugnant to the Constitution of the United States.

The petitioners in this cause, in and by the complaint therein (Record pp. 8, 9, 10, 11, Par. 7 of Complaint; Dist. Ct. Memoranda pp. 40-41-61), specially set up and claimed a right, privilege or immunity under the Constitution of the United States, particularly under the due process provisions of said Federal Constitution, the Fourteenth Amendment to the same, forbidding any state to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, which Federal claim was denied by the final judgment of the said State Supreme Court in this cause as shown by this petition and the record and proceedings in said State Supreme Court filed herewith (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

The pertinent section of the Federal Constitution reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without*

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Honorable Court has jurisdiction to review this cause and the final judgment of the Supreme Court of the State of Minnesota in this cause by virtue of the provisions of Judicial Code, Sec. 237 as amended, Title 28 U. S. C. A., Sec. 344, subdivision (b), which reads as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

There are presented in this cause special and important reasons for the review of this cause on writ of certiorari hereby sought. The Supreme Court of the State of Minnesota, in this cause, has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States, or said State Supreme Court in this cause has decided a Federal question of substance in a way probably not in accord with the applicable decisions of the Supreme Court of the United States.

The petitioners in this cause, from its inception to the present, have persisted in the claim that the due process provisions of the Constitution of the United States were violated and that the subscribers and patrons of the regulated utility, The Tri-State Telephone and Telegraph Company, were denied due process of law by said Commission in the entering by said Commission of said assailed order purporting to prescribe and promulgate a new and higher schedule of telephone rates for said City of Saint Paul Metropolitan Area without the institution of a proceeding therefor, by order upon its own motion or complaint, without hearing, without evidence taken and recorded, without findings of fact upon the relevant factors necessary for consideration in the establishment and promulgation of public utility rates, and without a record capable of judicial review in relation to the reasonableness of the rates so purported to have been prescribed and promulgated, and the entering of said assailed order solely on the basis of the recitals of the same alleging an agreement on the part of said Company to desist in further attempts to litigate a previous rate proceeding then without the control of the said Commission and in the exclusive jurisdiction of the Supreme Court of the State of Minnesota,

and the alleged agreement of said Company and another company operating a separate and distinct telephone exchange in another metropolitan area within said state to accept the new schedule of rates (Rec. pp. 1 to 33 incl.) (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.)

The opinion and final judgment of said State Supreme Court are incorporated in the record filed herewith and the effect thereof in the denial of due process, the right asserted and claimed under the Federal Constitution by the petitioners in said cause, is set forth hereinabove and in the accompanying brief.

The following is an apt statement quoted from the memorandum of the said District Court in this cause (Record p. 136-137):

> "As had already been stated, in the absence of hearings, evidence and findings there can be no effective review by appeal. If this action does not lie then the only recourse left to the public for redress from what it believes to be an unjust rate is the political arena. But political arguments are a poor substitute for sworn witnesses, books of account, inventories, expert data, cross-examination, analyses and the atmosphere surrounding a quasijudicial or a judicial hearing when it comes to so intricate and multiplex a subject as rate regulation. It seems a reasonable conclusion that the provisions for hearings, recorded evidence and findings are for the protection of the public as well as the utility.
>
> "Nor does it follow that the alternative to a 'formal, expensive and long-drawn-out investigation or litigation' is a cloistered conference resulting in a multiple rate order, unheralded until after its promulgation, based upon general conclusions drawn from unrecorded information, and unsustained by any statement of facts found. And still less does it follow that

> having conducted a formal, expensive and long-drawn-out investigation over a period of four years, followed by three years of litigation, at an alleged cost to the taxpayers of $400,000.00 (Answer of Commissioners and Attorney General, p. 8), and resulting in judgments favorable to the public, the Commission is justified in bartering away a substantial portion of the benefits won, without notice to the public, without public hearings, on unrecorded information, and without findings upon essential matters."

The said quoted statement taken from said District Court memorandum, was directed to said assailed order of said Commission dated May 2, 1939, and the circumstances which attended the filing of said order by said Commission. The litigation therein mentioned as resulting in judgments favorable to the public pertained to the said Commission's order of March 31, 1936 and the said appeals therefrom by the Company to the said District Court and said State Supreme Court.

The said State Supreme Court in this cause has construed said Sec. 5291, Mason's Minn. St. 1927, so as to permit the Commission, by the device constructed for the enactment of its said order of May 2, 1939, to immunize said order from judicial review as to its reasonableness both as regards the patrons of the Company and the public, in violation of the Fourteenth Amendment to the Constitution of the United States and in denial of due process to subscribers and patrons of the Company for the service sought to be regulated and for which rates were sought to have been prescribed by said assailed order. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

Chicago, M. & St. P. R. Co. v. State of Minn., 33 L. Ed. 970, 981, 134 U. S. 418;

The assailed order admittedly made and entered without notice, hearing, evidence, or findings upon evidence, or a record capable of judicial review, manifestly did not conform to the minimal requirements of due process guaranteed by Sec. I of the Fourteenth Amendment to the Federal Constitution, to all interested parties in a rate proceeding of such character and constituted a denial of such due process to the subscribers and patrons of the public utility whose rates were thereby sought to be fixed and regulated. Citing (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.),

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Ohio Bell Teleph. Co. v. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302, 303, 304, 305;

Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434; 227 U. S. 88, 91;

St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295.

The writ of certiorari will lie to review a cause wherein the final judgment of a State Supreme Court adjudicates as valid an order of a state rate fixing commission made without evidence or based upon evidence insufficient for its support, or arbitrary in its nature and not conforming to the minimal procedural requirements of such due process. See,

Chicago, M. & St. P. R. Co. v. Public Utilities Com. of the State of Idaho, 71 L. Ed. 1085.

The petitioners specially set up and claimed that the assailed order did not conform to the due process provisions of the Federal Constitution and specifically enumerated its deficiencies in that regard by their complaint in paragraph seven thereof hereinabove cited (Record, pp. 8, 9, 10, 11). The decision upon this Federal question was necessary to the determination of this cause, and the opinion and final judgment of said State Supreme Court rejected said claim but avoided specific reference to it. This had the same effect as if said claim of Federal right had been expressly denied. (Rec. pp. 1 to 33 incl.) (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, 50 L. Ed. 596, 604.

See also,

Zucht v. King et al., 67 L. Ed. 194.

wherein the Court said:

"A question of unconstitutional exercise of authority under a constitutional law can be reviewed only by certiorari, unless associated with other questions sufficient to support writ of error."

REASONS FOR ALLOWANCE OF WRIT.

The petitioners, under this subdivision, refer to the previous subdivisions of this petition and the numerous statements therein set forth as reasons for the issuance of the Writ of Certiorari hereby sought.

The petitioners submit that there was presented, in this cause, a Federal question, specially set up in the said complaint by the claim that said assailed order violated the

due process provisions of the Constitution of the United States; that said Federal question was decided by the opinion and final judgment of the Supreme Court of the State of Minnesota, in this cause, in a way not in accord with the applicable decisions of this Court, and that the Federal question thus presented and determined was substantial in character. (Rec. pp. 1 to 33 incl.).

The said State Supreme Court in this cause, by its opinion and final judgment determined, that said assailed order was consistent with the due process provisions of the Federal Constitution and expressly construed said state statute, said Sec. 5291, so as to permit the making and filing of said assailed order, purporting to prescribe and promulgate telephone rates and charges to subscribers of said public utility, without notice, hearing, evidence, findings based on evidence, or a record of its proceedings capable of judicial review upon the question of the reasonableness of the rates and charges thereby purported to have been prescribed and promulgated. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

The said State Supreme Court, by said opinion and final judgment, held that said assailed order was sustained by its bare recitals of alleged agreement between the said Commission, the Companies thereby regulated or purported to have been regulated in the matter of rates and charges, and the promise of The Tri-State Telephone and Telegraph Company to refrain from further attempt to litigate the previous rate order of said Commission dated March 31, 1936, which had been, upon the appeals of said Company, sustained as reasonable and not confiscatory by the judgment of the said District Court and the opinion or

decision of said State Supreme Court, the latter dated February 24, 1939. (Rec. Proc. St. Sup. Co. pp. 1 to 20 incl.).

The previous decisions of this Honorable Court have consistently held that state rate fixing commissions, conditional to affording due process required by the Fourteenth Amendment of the Federal Constitution, must, in the prescription and promulgation of public utility rates, give notice of hearing, act upon evidence relevant to pertinent factors, make findings of fact upon competent evidence respecting fair value of the rate base, operating expenses and revenues of the utility to be thus regulated, and other pertinent factors, and that an order fixing such rates must be based upon competent evidence adequate to sustain the Commission's findings and a record capable of judicial review upon the question of the reasonableness of the rates prescribed.

The assailed order is utterly bereft of any of the minimal requirements of a valid rate order, and upon its face and by its recitals, demonstrates its denial of due process to subscribers and patrons of the utilities with which it purports to deal in the matter of the prescription of rates and charges.

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Ohio Bell Teleph. Co. v. Public Utilities Co., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302, 303, 304, 305;

Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433; 277 U. S. 88, 91;

St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295.

There can be no compromise in such matters upon the basis of convenience, expediency or a natural desire to be rid of harassing delay when the minimal requirements must be neglected or ignored.

Ohio Bell Teleph. Co. v. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302, 303, 304, 305.

The State Supreme Court opinion and final judgment, in this cause, are at material variance with the decisions of this Honorable Court. The said State Supreme Court opinion and final judgment, in this cause, and said assailed order, palpably transgress the inhibitions of the due process provisions of the Federal Constitution and manifestly deny to the public and the patrons and subscribers of The Tri-State Telephone and Telegraph Company due process of law secured to them by such due process provisions, and deprive them of their Federal constitutional right to demand compliance by said Commission with the aforesaid minimal requirements of such due process provisions as a condition precedent to its order prescribing and promulgating telephone rates. This cause presents a situation by the said State Supreme Court opinion and final judgment, manifestly requiring correction and revision by this Honorable Court upon its review and determination of this cause and the questions thereby presented. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., pp. 29, 30).

These points are further elaborated in the petitioners' supporting Assignment of Errors and Brief.

The petitioners by their said complaint alleged, as one of the grounds for the injunctive relief thereby sought that the petitioners, as such subscribers, and all others similarly situated had no plain, speedy or other adequate

remedy at law, such complaint incorporating said order of March 31, 1936 as Exhibit "A" and said order of May 2, 1939, as Exhibit "B", by copies annexed thereto, demonstrates the verity of said allegation and such was then and since has been the case. (Rec. pp. 1 to 33 incl. Complaint; pp. 14 to 27 incl. Order; pp. 28 to 33 incl. Order pp. 11 and 12)

WHEREFORE, in view of the premises, your petitioners, jointly and severally, pray that this Honorable Court grant and issue its Writ of Certiorari directed to the Supreme Court of the State of Minnesota requiring that the complete Record in this cause, in said Court, and its final judgment thereon, be certified to this Honorable Court, and that this Honorable Court will thereupon proceed to correct the errors herein cited and complained of and reverse the judgment of said Supreme Court of the State of Minnesota, in this cause; and as an alternative only in the event this Court shall deny such prayers for the issuance of a Writ of Certiorari, that this Court allow an appeal from said Final Judgment of said State Supreme Court unto your petitioners and accept this petition and the accompanying brief and certified transcript of the Record filed herewith as the petition of your petitioners for the allowance of such appeal for which your petitioners, jointly and severally, pray in the event of such denial, and your petitioners further pray that this Honorable Court grant unto your petitioners such other and further relief as the nature of the case may require and as may seem proper to this Honorable Court in the premises.

JOSEPH C. LENIHAN, JOSEPH P. KILROY and CITY OF SAINT PAUL, a municipal corporation,
Petitioners.

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of the County of Ramsey, State
of Minnesota.

Of Counsel.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

STATE OF MINNESOTA,
COUNTY OF RAMSEY—ss.

David J. Erickson, being duly sworn upon his oath deposes and says that he is one of the counsel for the petitioners, Joseph C. Lenihan, Joseph P. Kilroy and City of Saint Paul, a municipal corporation; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied the transcript of record and proceedings in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record and proceedings, and that he knows of the above proceedings had, and that he verily believes the facts stated in said petition are true.

David J. Erickson

Subscribed and sworn to before me this 12th day of October, 1940.

M. E. UTZ,
Notary Public within and for Ramsey County, State of Minnesota.
My Commission Expires Feb. 7, 1942.

Notarial Seal,
Ramsey County, Minnesota.